No. 43619-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FIRST-CITIZENS BANK & TRUST COMPANY,

Respondent,

v.

CORNERSTONE HOMES & DEVELOPMENT LLC, a Washington corporation; and its Guarantor DANIEL L. ALLISON and JEANNE ALLISON, individually and the marital community thereof,

Appellants.

REPLY BRIEF OF APPELLANTS ALLISON

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INTRODUCTION

Respondent First Citizens Bank & Trust Company (First Citizens) does not dispute that

- all obligations secured by the Deeds of Trust foreclosed upon were discharged by operation of law upon completion of the Trustee's Sales; and
- the Deeds of Trust foreclosed upon expressly state that they secure the Guaranty.

Instead, First Citizens requests the Court to ignore the express language in the Deeds of Trust and focus exclusively on the Guaranty. Thereafter, First Citizens argues that because the Guaranty does not state it is secured by the Deeds of Trust, it was not intended to be so secured and cannot be so secured. First Citizens then concludes that, since the Guaranty is not secured by the Deeds of Trust, RCW 61.24.100(10) does not apply and its deficiency claim survived the Trustee's Sales.

The express language of the bank's pre-printed forms, however, defeats First Citizens' arguments. The Guaranty expressly references and incorporates the terms of the Deeds of Trust. The Deeds of Trust explicitly provides that they secure the Guaranty. The Deed of Trust Act

provides that actions against commercial guarantors will be excepted from the general statutory prohibition against post non-judicial foreclosure deficiency actions, however only when that the guarantor's obligation was not secured by the deed of trust foreclosed upon. RCW 61.24.100(1), (3), (10). The Deeds of Trust that First Citizens foreclosed upon secured the Guaranty. By operation of law, the obligations of the Guaranty were discharged upon completion of the non-judicial foreclosure. As a result, First Citizens is now barred from seeking a deficiency judgment under the Guaranty.

ARGUMENT

A. The Express Contract Languages Explicitly Provides That The Guaranty Is Secured By The Deeds Of Trust.

1. The Guaranty expressly incorporates the terms of the Deeds of Trust.

First Citizens is silent in its brief with regard to the express language in the Deeds of Trust it foreclosed upon. Each of the Deeds of Trust states that it is "GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS AND THIS DEED OF TRUST." (CP 128, 155, 178, all caps in originals.) These terms in the Deeds of Trust are not left to interpretation, but are defined terms. The term "Indebtedness" is defined to include all

obligations payable "under the Note or Related Documents." (CP 134, 161, 184, emphasis added.) The term "Related Documents" is defined in the Deeds of Trust to include guaranties. (*Id.*) Thus, each of the Deeds of Trust expressly states that the Deeds of Trust secure related guaranties. First Citizens does not and cannot dispute this clear language or the meaning of this clear language. It does not even discuss the language.

Instead, First Citizens argues that there is no language within the Guaranty that states it is secured. First Citizens then simplistically concludes that, without such a statement within the Guaranty itself, it cannot be secured by the Deeds of Trust. The argument lacks merit on its face, since the Deeds of Trust (which are the documents that create the security interest in the properties) will govern with regard to any determination as to which obligations they secure. The deed of trust will always be a separate document from the documents evidencing the obligations it secures, be they promissory notes or a guaranties, or both. Nonetheless, the deed of trust alone will establish which obligations are being secured. First Citizens' certainly cites no legal authority to support its proposition that, regardless of any language in a deed of trust, a guaranty will only be secured if the guaranty itself so states.

More importantly, the Guaranty expressly references and incorporates the terms of the Deeds of Trust into the Guaranty. Contrary to First Citizens' urging, the Court cannot confine its review to the single document entitled Guaranty. The pre-printed form Guaranty provides: "This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty." (CP 32, emphasis added.) As with the Deeds of Trust, the term "Related Documents" is specifically defined in the Guaranty:

> **Related Documents.** The words "Related Documents" means all promissory notes, credit agreements, loan agreements, environmental agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other Instruments. Agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness. (Underlining added.)

(CP 33.) The Guaranty provides that the signatory is guaranteeing all the borrower's (Cornerstone Homes and Development, LLC) "Indebtedness" to the lender, to included Indebtedness that was "now existing or hereinafter incurred or created." (CP 31.) The Guaranty thereafter explicitly provides that it incorporates the terms of documents evidencing and related to those debts, including deeds of

trust, so that these Related Documents, together with the Guaranty, "constitute[] the entire understanding and agreement of the parties as to the matters set forth in this Guaranty." (CP 32.)

The Deeds of Trust expressly state that they secure guaranties; and the Guaranty expressly incorporates this deed of trust term into the Guaranty. The terms of the Guaranty thus contradict and defeat First Citizens' argument that the Guaranty does not state it is secured by the Deeds of Trust.

Citing *Robey v. Walton Lumber Co,* 17 Wn.2d 242, 255, 135 P.2d 95 (1943), First Citizens notes that the obligations imposed on the guarantor through a guaranty are separate and independent from the obligations imposed on the borrower by the related promissory note. Allison does not disagree with this basic principal of law regarding guarantors. From this basic tenant, however, First Citizens, without supporting legal authority, argues that the Deeds of Trust, and their express language including the Guaranty among the obligations secured, are wholly irrelevant to this deficiency action. Contrary to First Citizens' argument, this basic principal articulated in *Roby* does not render the Deeds of Trust irrelevant. As noted in *Roby,* "[i]f a primary or principal obligation does not exist, there cannot be a contract of guaranty." 17 Wn.2d at 255.

Moreover, First Citizens' argument runs afoul of rules of contract interpretation and the language of the Guaranty itself. As a general rule, instruments that are executed as part of the same transaction and that relate to the same subject matter should be read and construed together, "even though they do not refer to one another, or even though they are not executed between the same parties." *Turner v. Wexler,* 14 Wn. App. 143, 146, 538 P.2d 877 (1975). Where a contract document, as is the case here, expressly states that referenced documents are part of the contract, the separate documents must be construed together as one. *Levinson v. Linderman,*51 Wn.2d 855, 859, 322 P.2d 863 (1958).

In *Levinson,* our Supreme Court addressed the question of whether certain plans and specifications referenced in construction contracts were part of those contracts. After citing the general rule, the Court held that the express contract term directing that the separate documents be construed as one must prevail:

> This is not an ordinary contract, but a printed form copyrighted by the American Institute of Architects, designed for the specific purpose of making all documents one contract. The definition is unmistakable:
>
> > '(a) The Contract Documents consist of the Agreement, the General Conditions of the Contract,

> the Drawings and Specifications, including all modifications thereof incorporated in the documents before their execution. These form the Contract.'
>
> Under such circumstances, although the documents are physically separate, they constitute a single contract.

Id. at 859. *See also, Young v. Borzone,* 26 Wash. 4, 18, 66 Pac. 135 (1901).

The conclusion should be no different in this case. The bank's pre-printed form Guaranty incorporates the Deeds of Trust terms as terms of the Guaranty. The Deeds of Trust provide that they secure the Guaranty and, with those terms incorporated, the Guaranty also provides that it is secured by the Deeds of Trust.

2. First Citizens' cannot override express contract language with claimed, but unexpressed intent.

Relying on the contract construction rule that courts should look to the parties' intent to interpret the contract, First Citizens argues that parties did not intend for the Guaranty to be secured by the Deeds of Trust. There is no language in the Guaranty, however, to corroborate the claimed intent.

The starting point of all contract interpretation must be with review of the actual words employed in the contract. Courts are directed to determine intent based on "objective manifestations of the

agreement, rather than on unexpressed subjective intent of the parties." *Hearst Communications, Inc. v. Seattle Times Co.* 154 Wn.2d 493, 503, 115 P.3d 262 (1993). Thus, courts are only permitted to consider the evidence of intent "'to determine the meaning of *specific words and terms used'* and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'' *Id.* (emphasis in original, citations omitted). Courts "do not interpret what was intended to be written but what was written." *Id.* at 504. *See also, Oliver v. Flower International Corp.,* 137 Wn. App. 655, 660, 155 P.3d 140 (2007)

Again, the Guaranty incorporates the Deeds of Trust, which, in turn, explicitly provide that the Deeds of Trust do, in fact, secure the Guaranty. There is no language in the Guaranty to contradict this express, incorporated deed of trust term, much less that expressly states the Guaranty is not secured by the Deeds of Trust.

First Citizens' does point to the "waiver language in the guaranty" to confirm that "the parties had no intent that any anti-deficiency statute would apply in the first place." (Response Brief at p. 11.) Significantly, in apparent recognition of the recent Supreme Court decision in *Bain, infra,* First Citizens affirmatively abandons it argument from below (CP 100-01) that Allison waived any anti-

deficiency protection provided by the Deed of Trust Act when he signed the Guaranty. (*Id.* at p. 10 ("First Citizens is not claiming that the Allisons waived any protections of the deed of trust statute.") Re-labeling the argument as regarding "contract intent," as opposed to waiver, does not change the outcome. The anti-deficiency waiver provision includes no language to indicate that the parties did not intend for the Guaranty to be secured by the Deeds of Trust. (See CP 32.) The specific language in the Deeds of Trust that explicitly states the Guaranty is secured must prevail.

Even if the waiver did indicate that "the parties had no intent that any anti-deficiency statute would apply," that language cannot modify or provide the bank with refuge from the remedy limitations imposed by the Deed of Trust Act. Regardless of any claimed intention, there is only one interpretation that the law will permit in light of the actual contract language: The Guaranty is secured by the Deeds of Trust. The Deed of Trust Act provides that any and all obligations secured by a Deed of Trust are discharged upon election and completion of a non-judicial foreclosure on the same Deed of Trust. RCW 61.24.100(1), (10). Just this year, the Washington Supreme Court held that a lender cannot contractually modify or expand its

rights under the Deed of Trust Act. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 108, 285 P.3d 34 (2012).

As explained in the opening brief, when a lender elects to invoke the statutorily created remedy of non-judicial foreclosure, the election impacts the scope of the lenders other remedies. There are legal ramifications that follow the elected remedy of non-judicial foreclosure when the Guaranty is secured by the Deed of Trust. Under Washington law, a creditor that holds a deed of trust as security for a loan can use either judicial or non-judicial foreclosure.[1] *Fluke Capital Management Services, Co. v. Richmond,* 106 Wn.2d 614, 624, 724 P.2d 356 (1986). A creditor's decision to non-judicially foreclose is a decision to limit its own remedies – to sacrifice the substantial remedies that remain available in a judicial foreclosure – so that it may receive the benefit of the efficient and inexpensive non-judicial foreclosure process to realize on its security. *Id.; Thompson v. Smith,* 58 Wn. App. 361, 365-66, 793 P.2d 449 (1990). Once the lender elects the statutory remedy of non-judicial foreclosure, its rights are determined by the Deed of Trust Act. Absent express authorization,

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[1] As the court explained in *Thompson v. Smith*, 58 Wn. App. 361, 366, 793 P.2d 449 (1990):

> [T]he beneficiary of a trust deed is faced with an election of remedies upon default. The beneficiary may (1) where the trust deed secures a note, sue on the note; (2) foreclose under the existing mortgage foreclosure proceedings; or (3) foreclose pursuant to RCW 61.24.

First Citizens cannot contractually modify those rights. *Bain,* 175 Wn.2d at 108.

In *Bain,* the Supreme Court was asked to determine if a deed of trust beneficiary may non-judicially foreclose under the Deed of Trust Act when the designated beneficiary is not also the holder of the promissory note that the deed of trust secures. In *Bain,* the subject deed of trust contractually authorized the designated beneficiary to non-judicially foreclose pursuant to the Act. The Deed of Trust Act, however, defines a beneficiary as one who is not only designated in the deed of trust, but also is the holder of the secured note. The Act only conferred the power of non-judicial foreclosure to a beneficiary as defined in the Act. The *Bain* Court held that the Deed of Trust Act remedy could not be contractually altered and, since the beneficiary did not meet the statutory requirements, it was not conferred the power of non-judicial foreclosure. The Court explained:

> This is not the first time that a party has argued that we should give effect to its contractual modification of the statute. In *Godfrey,*[2] Hartford Casualty Insurance Company had attempted to pick and chose what portions of Washington's uniform arbitration act, chapter 7.04 RCW, it and its insured would use to settle disputes. The court noted that parties

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[2] *Godfrey v. Hartford Ins. Co.,* 142 Wn.2d 885, 16 P.3d 617 (2001).

> were free to decide whether to arbitrate, and what issues to submit to arbitration, but 'once and issue is submitted to arbitration, Washington's [arbitration' act applies.' By submitting to arbitration, 'they have activated the entire chapter and the policy embodied therein, not just the parts useful to them.' The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals.

Id. at 108 (emphasis added).

The statute is clear with regard to the scope of the exception to the general bar on deficiency judgments following non-judicial foreclosures. First Citizens chose to invoke the power of sale authorized by the Deed of Trust Act so as to complete a relatively quick and inexpensive sale of the encumbered properties without judicial review. In electing that statutorily created remedy it forfeited the right to seek a deficiency judgment based upon any contractual obligations secured by the same deeds of trust foreclosed upon. First Citizens cannot contract around the limitations that the Deed of Trust Act imposes, be that under the guise of a "waiver" or claimed "contract intent."

Statutory law in effect at the time of contract, "enter in and form a part of it, as fully as if they had been expressly referred to and incorporated in the terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." *Dopps v. Alderman,* 12 Wn.2d 268, 273-74, 121 P.2d 388 (1942) (emphasis added). *See also, Fischler v. Nicklin,* 51 Wn.2d 518, 522, 319 P.2d 1098 (1958); *Cunningham v. Weyerhaeuser Timber Co.,* 52 F. Supp. 654 (W.D. Wash. 1943). The Deed of Trust Act provides that a lender who non-judicially forecloses may only thereafter enforce obligations that were not secured by the deed of trust foreclosed upon. RCW 61.24.100(10). This law is part of and effects both the construction and discharge of both the Deeds of Trust and the Guaranty. The Deeds of Trust in this case secured the Guaranty. The obligations of the Guaranty were discharged by operation of law after First Citizens non-judicially foreclosed on those Deeds of Trust.

3. That the Allison's did not own the properties encumbered by the Deeds of Trust is irrelevant.

Finally, First Citizens argues that the Guaranty cannot be secured by the Deeds of Trust because the Allisons did not own the real property encumbered by the Deeds of Trust. Rather, the borrower (Cornerstone) owned the encumbered property. First Citizens cites to no law, however, that provides that a deed of trust may only secure

debt obligations if the debtor (be that the original borrower or a guarantor) is the owner of the property encumbered by the deed of trust. While it is true that, to encumber real property, a deed of trust must be signed by the owner of that real property, there is no requirement that the grantor on the deed of trust be the same person as the obligor on the debt being secured, be that the guarantor or the borrower, or both. In fact, the borrower, the grantor on the deed of trust and the guarantor can be three completely different individuals.

The Deed of Trust Act certainly does not impose a requirement common identity between the grantor and the borrower or between the grantor and the guarantor. The Act defines each separately. RCW 61.24.005. Significantly, RCW 61.24.020 describes as subject to the Act, "[a] deed conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or another to the beneficiary."[3] (Emphasis added.) Thus the Act expressly contemplates that a deed of trust may secure debt obligations other than those of the owner of the real property. Also, there are several provisions in the Deed of Trust Act in which the borrower, grantor and guarantor are addressed separately for notice and other purposes, indicating that

[3] Of course, there is common identity between the beneficiary of the Deeds of Trust and the beneficiary of both the Promissory Notes and the Guaranty. First Citizens in the common beneficiary of all these instruments.

there may be no commonality of identity between the three. *See,* RCW 61.24.005; .030(8);, .040(1); .090; .100.

There certainly are no provisions in the Act that indicate that the grantor (property owner) must be the same person as the borrower for the deed of trust to secure a borrower's obligation. Just as there is no such requirement for security for a borrower's debt, there is likewise no requirement that a guarantor's obligations may only be secured by a deed of trust if the guarantor owns the property. The Deeds of Trust in this case expressly state that they secure the Guaranty. That the grantor in the Deeds of Trust is a different party than the signatory of the Guaranty does not change that fact.

4. **The bank's exclusion of environmental indemnity obligations from the obligations secured by the Deeds of Trust confirms that the Guaranty is secured.**

It is apparent from the contract language that the import and legal consequences of securing any obligation by the Deeds of Trust was known to the bank. Once again, the Deeds of Trust secure not only the promissory note, but also the obligations in "Related Documents." (CP 128, 155, 178.) While the Deeds of Trust were expansive in their definition of Related Documents, the bank nonetheless took care to expressly exclude some obligations. The Deeds of Trust provide:

> The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided that the environmental indemnity agreements are not "Related Documents" and are not secured by this Deed of Trust. (Emphasis added).

(CP 134, 161, 184.)

The bank understood that all obligations in Related Documents were secured by the Deeds of Trust and took care to remove obligations that it did not desire to so secure. Guaranties were expressly included as obligations secured by the Deeds of Trust and environmental indemnity agreements were expressly excluded. The singular conclusion to be drawn from these express words is that the bank both knew and understood it was securing the Guaranty. This decision, along with the election to non-judicially foreclose, has legal consequences that cannot now be avoided.

B. Upon Election And Completion Of The Statutory Remedy Of Non-Judicial Foreclosure, The Obligations Under The Secured Guaranty Were Fully Discharged By Operation Of Law.

First Citizens argues that RCW 61.24.100(10) is an exception to a general authorization to obtain deficiency judgments against

commercial guarantors and, thus must be construed narrowly. The language of the Deed of Trust Act is to the contrary.

The starting point is that the Deed of Trust Act serves to bar a secured lender who elects to foreclose non-judicially from seeking and obtaining a deficiency judgment against a guarantor of any loan secured by a foreclosed upon deed of trust. RCW 61.24.100(1). Where deficiency actions are authorized, they are authorized as exceptions to this general bar. The relevant language of RCW 61.24.100 is below. Emphasis has been added to demonstrate that deficiency actions are an exception to the general legislative mandate barring such actions following a non-judicial foreclosure.

> (1) **Except to the extent permitted in this section** for deeds of trust securing commercial loans, **a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any** borrower, grantor, or **guarantor** after a trustee's sale under that deed of trust.
>
> * * *
>
> (3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:
>
> * * *
>
> (c) **Subject to this section**, an action for a deficiency judgment against a guarantor if the guarantor is timely

> given the notices under RCW 61.24.042.
>
> * * *
>
> (10) A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust. (Emphasis added.)

Read together, the Deed of Trust Act provides that deficiency judgments following a non-judicial foreclosure are statutorily prohibited against a guarantor [RCW 61,24.100(1)] except when (1) the guarantor guaranteed a commercial loan [RCW 61.24.100(3)], (2) the guarantor of the commercial loan was given certain specified notice [RCW 61.24.100(3)(c)], (3) deficiency action is commenced within one year of the trustee's sale [RCW 61.24.100(4)], and (4) the guarantor's obligation "was not secured by the deed of trust" foreclosed upon [RCW 61.24.100(10)].

First Citizens action does not qualify as an authorized deficiency suit against a commercial guarantor, because the Guaranty upon which it sues was secured by the Deeds of Trust. The interpretation of the Act and contracts does not render any portion of either superfluous or without meaning. The Guaranty has effect and value in instances in which the bank judicially forecloses, as well as in instances in which it

elects to sue on the Guaranty separate and in advance of any foreclosure. Likewise, the statutory authorization of deficiency actions against commercial guarantors is not rendered meaningless or superfluous. To preserve the statutory remedy of deficiency actions against commercial guarantors, the bank need only draft the deed of trust such that it does not secure the guaranty.

First Citizens' argument, on the other hand, renders meaningless the entirety of subsection (10) to RCW 61.24.100. Its proposed contract construction likewise renders meaningless the Deeds of Trust terms that explicitly provide that the they secure the Guaranty. The law does not permit acceptance of such an interpretation of the statute or contracts. *Gimlett v. Gimlett,* 95 Wn.2d 699, 703, 629 P.2d 450 (1981) (statutory construction); *Cambridge Townhouses LLC v. Pacific Star Roofing, Inc.,* 166 Wn. App. 475, 487, 209 P.3d 813 (2009) (contract construction).

Again, the choice to secure the Guaranty by the Deeds of Trust was exclusively the bank's choice and within the bank's control. It must now live by that choice. RCW 61.24.100(10) is dispositive here.

C. First Citizens' Cannot Avoid The Legal Consequences That Flow From Its Own Contract Language And Voluntary Election To Non-Judicially Foreclose Through Cries Of Unfairness Or Perceived Windfalls.

Finally, First Citizens argues that construing the contract and statute as written will be unfair to the bank and result in a windfall to Allison. The bank's cries of unfairness are questionable, since the bank exclusively dictated the form of the loan documents. Likewise, the bank unilaterally and voluntarily made the election to foreclose non-judicially. Regardless courts have specifically held that, irrespective of any claimed or perceived "windfall," the court "is not authorized to rewrite the contract; [its] task is to construe it." *Rodenbough v. Grange Insurance Ass'n,* 33 Wn. App. 137, 140, 652 P.2d 22 (1982).

> "The courts in construing the contract, must interpret them according to the intent of the parties. However, the court cannot rule out of the contract language which the parties thereto have put into it, nor can the court revise the contract under the theory of construing it, nor can the court create a contract for the parties which they did not make themselves , nor can the court impose obligations which never before existed. The terms of the policy must be understood in their plain, ordinary, and popular sense. Clear and unambiguous language us not to be modified under the guise of construing the policy."

Id., quoting Farmers Ins. Co. v. Miller, 87 Wn.2d 70, 73, 549 P.2d 9 (1976).

The same is true with regard to construction of the Deed of Trust Act. The Act expressly provides that a lender who elected to foreclose non-judicially may only pursue "an action to collect or enforce any obligation of . . . a guarantor if that obligation or the substantial equivalent of the obligation, was not secured by the deed of trust." RCW 61.24.100(10). First Citizens asks the Court to essentially nullify this limiting provision based on claims of unfairness. Of course, courts are not authorized to disregard and nullify express statutory language and mandates based on claims of unfairness.

Notably, after reaching its decision in *Bain*, the Supreme Court rejected the lenders' claim that the Court should interpret the Act to avoid an unfair result to the lenders. Like here, the purportedly unfair consequence experienced by the bank resulted from its own contract language. The *Bain* Court noted "it is not the plaintiff [borrower] that manipulated the terms of the act; it was whoever drafted the forms used in these cases." 175 Wn.2d at 109. In any event, the Court noted, "[t]he legislature, not this court, is in the best position to assess policy considerations." *Id.*

Allison requests no more than that the contracts the bank drafted be interpreted and given the legal effect that is consistent with the words the bank employed. Allison requests that RCW 61.24.100(10) likewise be applied consistent with its plain language. Only the bank elected to draft the Deeds of Trust so as to secure the Guaranty; and only the bank elected to foreclose non-judicially. The bank may now regret its elections and Allison may have ultimately benefited from those elections. Nonetheless, the elections were exclusively those of the bank and were made without Allison's input. Belated claims of unfairness are not well taken and are without legal support.

CONCLUSION

After the borrower, Cornerstone Homes, defaulted, First Citizens had available different remedies to obtain payment on the promissory notes. It could have proceeded with a judicial foreclosure action against the borrower and the guarantor, fully preserving both the right to sell and receive the proceeds from the Deeds of Trust properties and the right to obtain a deficiency judgment on all obligations secured by the deed of trust, to include the borrower's obligations and the guarantor's obligation. See Chapter 61.12 RCW; RCW 61.24.020; RCW 61.24.100(8). Alternatively, First Citizens could have sued the

guarantor (and the borrower) for the full amount of the debt, and thereafter executed against the guarantor's asset and borrower's assets. Finally, First Citizens could elect to obtain the benefits of a non-judicial foreclosure, which includes receiving the benefits of an efficient, inexpensive statutorily created process, by conducting a trustee's sale of the Deed of Trust properties without judicial supervision pursuant to Deed of Trust Act. Chapter 61.24 RCW. This is the remedy that First Citizens voluntarily chose.

First Citizens' action should be deemed barred because of its election to foreclosure non-judicially. With its election, First Citizens reaped the benefits associated with a non-judicial foreclosure. With its voluntary election, First Citizens must also accept the statutory limitations that accompany the benefits. When First Citizens elected to foreclose non-judicially, it also elected to waive certain rights it might have preserved with a judicial foreclosure. Most significantly, it waived its right to collect a deficiency on any and all obligations secured by the Deed of Trust foreclosed upon. RCW 61.24.100(1), .100(10). Since the Guaranty is secured by the Deed of Trust foreclosed upon, the plain language of RCW 61.24.100(10) also provides that First Citizens' election to foreclose non-judicially also resulted in a waiver to seek a deficiency judgment against Allison as the guarantor.

This Court should reverse the trial court and remand the matter with instructions to dismiss First Citizens' deficiency action with prejudice.

Dated this 1st day of November, 2012.

Respectfully submitted,

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No. 43619-1-II

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THIS IS TO CERTIFY that on this 1st day of November, 2012,I did serve via email and U.S. Postal Service (or other method indicated below), true and correct copies of the foregoing Reply Brief of Appellants Allison by addressing for delivery to the following:

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